No. 2243 10

United States
Circuit Court of Appeals
For the Ninth Circuit

DUVAL JACKSON,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Bankrupt,

Respondent.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

On Petition for Review from the United States District Court for the District of Idaho, Northern Division

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Brief of Petitioner Duval Jackson on Review

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The United States Circuit Court of Appeals for the Ninth Circuit

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ARGUMENT AND AUTHORITIES.

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STATEMENT OF CASE.

The petition of Duval Jackson for Writ of Review in this case shows the following facts:

That on the 24th day of June, 1912, petitioner Duval Jackson made a proposal to purchase the property of the Lane Lumber Company, Bankrupt, for One Hundred Forty Thousand ($140,000) Dollars. This proposal was in two bids, aggregating the amount above specified, and on each one of the proposals or offers, petitioner deposited with the Trustee his check for One Thousand ($1,000) Dollars as evidence of his good faith.

The Trustee did not at this time or at any time sub-

sequently accept the offer of Duval Jackson, but he did petition the court, praying that a sale for said amount be confirmed. This petition for confirmation was set down for hearing on the 15th day of July, 1912. On the 10th day of July, 1912, petitioner withdrew his offers to purchase, by sending a telegram to the Referee and also to the Trustee, and on the same day mailed two written withdrawals and demanded a return of the Two Thousand ($2000) Dollars which he had deposited with the Trustee. The telegrams and letters of withdrawals were received by the Court and the trustee prior to the meeting of July 15th. Notwithstanding the withdrawals of the two offers to purchase, the Court on said day took up the question of confirmation of the sale to petitioner on his original offers, and as shown by the order made and entered by the Referee (Record, pages 30-32, inclusive), the proposals were not accepted and confirmed by the Court, but certain property, to-wit, all of the lumber, lath, and 300,000 feet of cedar logs, were excepted, and the sale confirmed as to the balance.

As the Trustee refused to return the Two Thousand ($2,000) Dollars which petitioner had deposited with him at the time these offers were made, a petition was filed on the 8th day of October, praying the Court to direct the Trustee to refund the Two Thousand ($2,000) Dollars so deposited, to said petitioner. This petition was brought on for hearing on the answer of the Trustee admitting the facts set forth in the petition, and on the 11th day of November, 1912, the Court made an or-

der requiring the Trustee to refund said Two Thousand ($2,000) Dollars to said petitioner. From this order and ruling of the Referee, the Trustee took a review to the District Court, claiming that the Referee was in error in making said order, on three grounds:

1. In holding that Duval Jackson had the legal right to withdraw his bids and each of them, prior to the acceptance by the Court, is contrary to the terms of the written bid made by Duval Jackson and is against the law.

2. There is no showing or contention that the Trustee did not comply with the terms and conditions of said contract, required of him to be performed, therefore said order is against the law.

3. The amount of money deposited with the bids was required to compel the purchaser to show his good faith, which is conceded by the terms of the bid; that the petitioner after putting the machinery of this court in operation for the purpose of having said sale confirmed, showed his bad faith by withdrawing his bid on the day of hearing just before the hour set for the hearing, therefore said order is against the law.

This review came on for hearing before the Honorable F. S. Dietrich, District Judge on the 3rd day of December, 1912. A decree was entered reversing the order of the referee in Bankruptcy and holding that the Trustee was entitled to retain the Two Thousand ($2,000) Dollars paid to him by petitioner, Duval Jackson, at the time of the offer to purchase the property in

question. From this decree appellant has taken a review to this court.

ASSIGNMENTS OF ERROR.

Petitioner assigns error as follows:

I.

The court erred in making and filing his conclusions of law that the referee's order complained of by the Trustee should be reversed, vacated and set aside and costs taxed against said Duval Jackson.

II.

The Court erred in decreeing that petitioner Duval Jackson is not entitled to a return of the $2,000.00 paid to the Trustee as an evidence of his good faith in making his written offers to purchase the property of the Lane Lumber Company, Limited, a bankrupt.

III.

The Court erred in making and filing his decree reversing, vacating and setting aside the order of the referee in said matter and in taxing costs against said petitioner Duval Jackson.

IV.

The Court erred in making and filing his decree in said matter and in denying petitioner the relief asked in his petition.

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ARGUMENT AND AUTHORITY.

As the facts are admitted in this case, the only question to be decided is the one of law; and that is as to whether or not Duval Jackson had the legal right to

withdraw his bids for said property at any time before the acceptance thereof, and whether the referee in bankruptcy by excepting a part of the property which petitioner offered to purchase from the order confirming the sale did not, in effect, constitute a new offer which petitioner would have to accept before he would be legally bound to take the property.

The proposals, or offers to purchase, of Duval Jackson were merely an offer to contract in the future. There was no consideration whatever for the payment of the Two Thousand Dollars, as no contract was entered into between the parties. In fact, the proposal specifically provides that, if, when a contract has been consummated by the acceptance of the offer made, petitioner fails to carry out his part of the contract, he is not to be liable for more than Two Thousand Dollars, by reason of failure to perform the contract. Now clearly this amount could not be retained as liquidated damages for breach of contract, but until there was a contract between the parties there would be no liability on the part of Duval Jackson to forfeit the amount of money which he had paid to the Trustee.

It is a rule of law laid down by all authorities, so far as we are able to find, that an offer may be withdrawn at any time before acceptance.

9 Cyc 284-5-6-7.

Martin v. Hudson, 22 Pac. 292 (Calif.).

Sherwin v. National Cash Register Co. 38 Pac. 392 (Colo.).

ber. The petition thus clearly shows that the offer of your petitioner was never accepted by the Trustee or the Court, and that the attempt to confirm the same by excepting certain of the property mentioned, amounted in effect only to a new proposition or offer on the part of the Trustee and Court, which would necessarily have to be accepted by your petitioner before it would become a binding contract.

If, conceding that your petitioner had no legal right to withdraw his offer to purchase prior to the time set for confirmation, which would entitle him to a refund of the money deposited, the attempted confirmation of sale certainly would not bind your petitioner to accept the property under the new proposal or offer made by the court.

It is a fundamental principle of law that an offer must be accepted as made, and any variation in the acceptance from the offer made, either as to time, place, quantity or other matters, is not deemed in law a sufficient acceptance of the offer to make a binding contract.

9th Cyc. pg. 265.

"An acceptance, to be effectual, must be identical with the offer, and unconditional. Where a person offers to do a definite thing, and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is a counter-proposition, and in neither case is there an agreement. This is true, for example, where an acceptance varies from

the offer as to the time of performance, place of performance, price, quantity, quality, etc.''

9th Cyc. pg. 267, 268.

This principle of the law is so clear and undisputed that we do not deem it necessary to cite further authorities. Petitioner contends, therefore, that as the offer made had never been accepted up to the time of withdrawal, that he had a perfect right to withdraw the offer and have the money returned to him which he had deposited with the Trustee. Suppose, for instance, that petitioner, instead of depositing $2,000.00 on his offer had specified in his written offer that as an evidence of good faith, he was depositing the entire purchase price. Would any one contend for a minute that where the offer was withdrawn prior to the acceptance, that the entire purchase price could be restrained?

The cases of Blossom v. Milwaukee R. R. Co., 1 Wallace 656; 17 Law Ed. 673; Camden v. Mayhew & Co., 129 U. S., 73, 32 Law Ed. 608 cited by the Honorable District Judge do not appear to us to be in point.

The case of Camden v. Mayhew & Co., 129 U. S., 73, 32 Law Ed. 608 was an action requiring appellants to pay the difference between the amount bid by him for certain real estate offered for sale at public auction under a decree in the same suit, and the amount the same property brought on a resale had because of his refusal to comply with the terms of the bid.

It will be seen that this case is not in point, for the reason that in that case, property was offered for sale at

public auction, and appellant bid $173,050 and the property was knocked down to him at that price; and a report made by the commissioners to the court of said sale at the place mentioned. However, appellant would not pay the amount nor any part thereof, so that subsequently it became necessary to resell the property and at the second sale the property only brought $119,100.

It is a rule of law that in auction sales the party bidding is always liable for the amount of his bid where the property is knocked down to him, and if he fails to complete the purchase for the price bid, he is liable for the difference between the price the property brings at a subsequent sale and the amount bid; but in the case at bar there never was any acceptance of the offer made, in fact, the sale was not a sale at public auction, the court had authorized the Trustee to sell at private sale, and he had secured a party who made an offer, and this offer was put up to the court to accept or reject as he should see fit.

The case of Blossom v. Milwaukee R. R. Co., 1 Wallace 656; 17 Law Ed. 673, is also a case of sale at public auction and the rule would be different than in cases of private sale.

In the case of Tillman v. Dunman, Executor, 114 Ga. 406; 57 L. R. A. 784, in an exhaustive note thereto, it is held that a judicial officer has the right at any time to withdraw an offer to sell property after a bid has been made and before acceptance or confirmation by the

Court. This rule should apply with equal force to the party making the offer.

In re: American Copper Co., 183 Fed. 556.

It must be conceded that the offer of Duval Jackson was not accepted by the Trustee, for if he had received a better offer any time after the making of the offer by petitioner in this case it would have been his duty, and he could legally have disregarded the offer of the petitioner and returned the $2,000.00 to him which he had paid, and there would have been no way of enforcing a specific performance of the contract.

The offer to purchase clearly shows that the money was not deposited to be held as stipulated damages in case of failure to complete the contract prior to its acceptance; but it does show clearly, that if, after the sale was confirmed, and a binding contract was made between the parties, petitioner failed to complete the contract, then he was not to be liable for any further damages by reason of such failure.

As to the question that the trustee is entitled to retain the Two Thousand Dollars because of the bad faith of petitioner in withdrawing his bids, we have been unable to find a single case, and we do not think that the Trustee can find one, sustaining his position. While it is true that the $2,000.00 was deposited as an evidence of his good faith, petitioner still had the right to withdraw his bids and it would be encumbent upon the Trustee to prove that the bids were made with some ulterior motive or purpose in view by which he expected

to benefit by the transaction, before there could be any question as to the Trustee's right to retain the $2,000.00 Dollars. It is not claimed by the Trustee that there was any such purpose in withdrawing the bids, and petitioner had the right to withdraw them at any time before they were accepted.

Under the decisions above cited, we are satisfied that petitioner is entitled to the $2,000.00 paid the Trustee at the time he made the offer for the purchase of the property of the Lane Lumber Company, and as this offer was not accepted by the Trustee, nor confirmed by the Court, prior to the withdrawal, petitioner is entitled to his money.

Petitioner is entitled to recover the $2,000.00 from the Trustee, even if it should be decided that he had no legal right to withdraw the offer before the time set for confirmation, because the action of the referee in excepting a part of the property from the offer to purchase shows clearly and conclusively that the Court made a new offer and as petitioner never accepted the same, no contract was in fact made between the parties.

We respectfully submit that the decree of the Honorable District Judge was erroneous, and should be reversed, and a decree entered, requiring the Trustee to

refund to your petitioner Duval Jackson, the sum of Two Thousand ($2,000) Dollars with interest.

Respectfully submitted,

FRANK W. REED,

EUGENE V. BOUGHTON,

Attorneys for Petitioner,

Coeur d'Alene, Idaho.

CLAY H. ALEXANDER,

Attorney for Petitioner,

Kansas City, Missouri.

Service of the within Brief of Petitioner Duval Jackson, on Review, is hereby accepted, by the receipt of a copy thereof, this.....day of April, A. D. 1913.

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Attorney for Trustee,

Coeur d'Alene, Idaho.